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In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

RESPONDENT'S BRIEF IN OPPOSITION

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Attorney for Respondent

WILLIAM GRIFFIN
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY

The Petition for a Writ of Certiorari seeks an untimely review of a unanimous decision of the Supreme Court of Vermont. On an appeal from a decision dismissing the underlying charges, the Court decided that the petitioners were subject to prosecution for fishing without a license, rejecting their claim that the Missisquoi

Abenaki[1] hold aboriginal title to the fishing area. Following the Court's order of reversal and remand, Pet. App. A 28, the petitioners now await trial.

The Vermont Supreme Court applied the principles established by this Court in aboriginal rights cases from *Johnson v. McIntosh*, 21 Wheat. 543 (1823) to *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985). It concluded, based on record evidence, that any aboriginal title to the site of the charges was extinguished by the actions and events that culminated in Vermont's admission to the Union in 1791. As the Court indicated: "Short of an express statement declaring an intent to extinguish, it is difficult to imagine a demonstration of intent that could be more unequivocal than these cumulative events leading to statehood." Pet. App. A 28.

STATEMENT OF THE CASE

The Vermont Supreme Court traced the historical events that determined sovereignty and ownership of the lands in question. The facts are not subject to serious dispute. The Supreme Court accepted most of the trial court's findings, which in turn were based on petitioners' evidence. The Supreme Court differed with the trial court "principally in its application of the test for extinguishment to discrete events in Vermont's history, rather than

[1] The Vermont Supreme Court did not decide whether the Missisquoi Abenaki are a bona fide tribe of Native Americans, Pet. App. A 11. They are not a tribe recognized by the Bureau of Indian Affairs.

to the cumulative effect of many historical events." Pet. App. A 20.

The Court began its analysis by examining the land grants made by Benning Wentworth, the Royal Governor of New Hampshire, in August, 1763.[2] *Id.* at A 13; *see also* B 30, ¶115. Governor Wentworth's grants encompassed the Towns of Swanton (the site of the fishing charges), St. Albans and Highgate. *Id.* The grants were intended to be possessory, and expressly required that the lands be settled and improved. *Id.* at A 13 n.4, A 26.

The settlement of these and other grants made by Governor Wentworth began in the 1760's. In 1766, at a meeting at Isle LaMotte[3] attended by British officials and Native Americans, "the Missiquoi [Abenaki] complained of settlers on their land". *Id.* at B 10-11, ¶¶37-38. The next year, in 1767, a Wentworth grantee petitioned the King "on behalf of himself and more than one thousand other Grantees" who claimed they had "expended large sums of money in settling and cultivating" their Vermont grants. Resp. App. A 2. *See also* Pet. App. B 12, ¶41 (the Missisquoi lost control of choice farmland in the period 1775-1785); B 12, ¶43 (in 1783 the Missisquoi withdrew from central areas and went "underground" in response to "the influx of Europeans"); B 13, ¶51 ("by 1791 the

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[2] The grants are variously referred to as the Wentworth grants or the New Hampshire grants.

[3] Isle LaMotte is a town in northwestern Vermont about ten miles from Swanton.

Missisquoi were dispossessed of the choicest part of their homelands").[4]

The lands covered by the Wentworth grants were also claimed and granted by the Royal Governors of New York. *Id.* at A 14-15; B 31, ¶121. In 1764 the Crown resolved the jurisdictional issue by ruling that the Connecticut River was the boundary between the two colonies, putting the Wentworth grants under the jurisdiction of New York. *Id.* at A 15; B 30, ¶116. In 1767, however, the Crown answered the petition brought by the Wentworth grantees and prohibited the New York Governor from making any grants of their lands. *Id.* at A 15; Resp. App. A 1-3.

The dispute between the Vermont settlers and the New York government continued until January, 1777, when the Vermonters declared their independence and proclaimed a Republic. Vermont's 1777 constitution asserted the Republic's jurisdiction over the lands granted by Governor Wentworth and contained an "explicit ratification of the Wentworth grants." Pet. App. B 78-79.

By 1781 Vermont was actively seeking admission to the Union, and in the process Congress inquired about the settlement and ownership of the Wentworth grants.

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[4] The trial court finding that settlement did not begin until 1783, Pet. App. B 30, ¶115, is both internally inconsistent and unsupported by evidence. The trial court cited p. 132 of the testimony of historian Gordon Day ("D at 132"). The initial transcript of his testimony indicated that settlement "began around 1670". Resp. App. at B 1. This was later corrected to "1760". *Id.*

Vermont's representatives said that they would adopt procedures for resolving conflicting claims resulting from the New York and New Hampshire grants, and that they would allow "a further reasonable time" for settlement so that forfeitures of unsettled lands would be avoided. *Id.* at A 17-18 n.8. Congress did not challenge this proposal, but resolved that the Vermonters would have to relinquish their claims to "lands or jurisdiction on the east side of the west bank of the Connecticut River" (that is, their claims to lands in present day New Hampshire). *Id.* at A 18-19. In order "to confirm their entitlement" and to fulfill their commitment to Congress the Vermonters proceeded to enact legislation that extended the time for settling the grants. *Id.*

Vermont's admission to the Union was then delayed pending a resolution of New York's claims to the area. New York's consent to Vermont statehood was obtained in 1790 when Vermont paid New York $30,000 " 'for relinquishment of all claims of sovereignty by New York, and for the confirmation of the New Hampshire township grants.' " *Id.* at A 19 (quoting from *Vermont v. New Hampshire*, 289 U.S. 593, 611 (1933)). Vermont was admitted to the Union on these terms in 1791. *Id.*

In summary, the record shows and the Supreme Court of Vermont concluded that:

> The Crown's sanctioning of European dominion over the area, the zeal with which the founders of the "Republic" of Vermont protected the New Hampshire Grants, and the negotiations with Congress in anticipation of Vermont joining the Union remove any doubt that extinguishment of

> Abenaki aboriginal title was complete by 1791, when Vermont became the fourteenth state.

Id. A 20-21.

REASONS FOR DENYING PETITION

Certiorari should be denied because, contrary to petitioners' assertions:

1. The cause is not yet final.

2. The Vermont Supreme Court gave full effect to the precedents of this Court that govern the extinguishment of aboriginal title.

3. The decision of the Vermont Supreme Court was based entirely on record evidence and facts established at trial.

I. In the absence of appellate review of a final judgment, the cause is not ripe for determination.

Petitioners seek a writ of certiorari from a decision by the state's highest court that reverses and remands the cause for trial. If petitioners are convicted, a second appeal, even one that is a formality, is still a prerequisite to Supreme Court review in accordance with the requirements of 28 U.S.C. § 1257. *McComb v. Commissioners,* 91 U.S. 1 (1875); *Great Western Tel. Co. v. Burnham,* 162 U.S. 339 (1896).

Petitioners argue that the exceptions to the finality rule, as discussed in *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975), apply here and permit this Court to

review these claims. Under *Cox* petitioners must raise a federal issue which, if left unresolved, would "seriosly erode federal policy". *Id.* at 483. Petitioners argue that they have met that requirement because the Vermont Supreme Court articulated a new federal policy for extinguishment of aboriginal rights. In fact, as discussed below, the state high court applied the same standards and mode of analysis used in the past by this Court. There are no novel federal policy issues at stake. Unlike the First Amendment issues implicated in *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 55 (1989), this cause does not impact on federal policy. The decision of the Vermont Supreme Court does not carve out or create new law in the area of Indian rights. Moreover, the Court scrupulously applied the proper federal law.

As to the other claimed exception, petitioners assert that "the federal issues will survive and require a decision." Pet. at 5. In the *Cox* case this Court described this exception as one of "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue *cannot be had,* whatever the ultimate outcome of the case." *Cox Broadcasting Corporation v. Cohn, supra,* at 481 (emphasis added). Here, if the petitioning parties lose in the criminal court, they may appeal their convictions at the state high court and then petition this Court.

In sum, the respondent urges the Court to literally interpret the exception language it enunciated in *Cox*. The outcome of further proceedings is not "preordained". *Cox Broadcasting Corporation v. Cohn, supra,* at 479. Petitioners do not satisfy the requirements of 28 U.S.C. § 1257.

II. The Vermont Supreme Court Gave Full Effect To The Precedents Of This Court That Govern The Extinguishment Of Aboriginal Title.

Petitioners argue and respondent agrees that "[t]he rules governing aboriginal title and its extinguishment have been well established in a long line of cases starting with the 1823 decision in *Johnson v. McIntosh*, 21 Wheat. 543 (1823) and culminating in the 1985 decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985)." Pet. at 15.

The Vermont Supreme Court acknowledged and applied these same precedents. The Court began its legal analysis by observing that:

> Sovereign intent to extinguish need not be express, but there must be evidence that demonstrates a "plain and unambiguous" intent to extinguish exclusive aboriginal rights. *Oneida II*, 470 U.S. at 248. Because of the federal policy to respect Indian rights of occupancy, the intent to extinguish Indian Title will not be " 'lightly implied.' " *Id.* at 247-48 (quoting *Santa Fe*, 314 U.S. at 346).
>
> * * *
>
> The essential test requiring sovereign consent to extinguish aboriginal rights has remained intact since its adoption in *Johnson*.

Pet. App. A 9-10.

Petitioners complain that the Court considered "the increasing weight of history" when it reviewed the historical events that extinguished aboriginal title. This is true, but is not heresy. The Court simply recognized that

events must be considered in their "historical setting". *See United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 358 (1941) ("In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved.")

Petitioners argue that the British sovereign intended to protect and not extinguish aboriginal title. The "Royal Instruction" of 1761 and the "Royal Proclamation" of 1763 did indicate a general intent that colonial governors should preserve aboriginal rights. However, as the Vermont Supreme Court noted, the Crown's later and specific Orders respecting the Wentworth grants preserved the status quo of European settlement. "The necessary and inevitable outcome of the Crown's position [in 1764 and 1767] would still be that Europeans would appropriate the area . . . These events are evidence of increasing European dominion adverse to the use and occupation of the Indians, to which the Crown impliedly consented." Pet. App. A 22; *see also id.* at A 15; Resp. App. A 1-2.

Petitioners claim that the Abenaki lived openly and peacefully on the Wentworth grants from 1763 until 1791, and argue that this somehow rendered the grants void. Legal theory aside, this claim is flatly contradicted by the trial court findings and by the record. "In the period 1775-1785 the Missisquoi lost control of choice farmland along the Missisquoi River as English and Dutch settlers moved in." Pet. App. B 12, ¶41. In 1786 the Missisquoi "were claiming land and threatening to use force against the settlers". *Id.* at B 12, ¶42. "In 1786 the Missisquoi went 'underground' . . . [T]heir response to the influx of Europeans was withdrawal from central areas into other areas in the Missisquoi homeland, where they would be out of

sight." *Id.* at B 12, ¶43. In 1790 "[f]ace to face confrontations with yankees over their presence and control of land are of record." *Id.* at B 13, ¶48.

Petitioners dismiss the actions of the Vermont revolutionary government during the period 1777-91, saying that "[s]overeignty passed directly from Great Britain to the United States." Pet. at 18 n.11.[5] Congress negotiated directly with Vermont and characterized Vermont as a "state" before it was admitted to the Union, and not as a "district" within the jurisdiction of an existing state. *Compare* Acts of the First Congress, Sess. III, Ch. 4 (Feb. 4, 1791) (admitting the "district of Kentucky, within the jurisdiction of the Commonwealth of Virginia") and Ch. 7 (Feb. 18, 1791) (admitting the "State of Vermont"). Therefore, there is reason to treat the Republic of Vermont as a sovereign state. In any event, the "explicit ratification" of the Wentworth grants in Vermont's 1777 Constitution, Pet. App. B 78-79, at least put Congress and the world on notice as to the grantees' claims to jurisdiction and ownership of the area.

Finally, petitioners argue that Congress did not intend to impair the aboriginal claims of the Abenaki. The Vermont Supreme Court concluded otherwise, holding that "[t]here is no doubt that Congress considered and intended the New Hampshire Grants, in 1791, to be possessory." *Id.* at A 27. In reaching that conclusion the Court relied on the same history of negotiations that was cited

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[5] Petitioners cite to their Appendix at A 8-9 as support for this assertion, but the text does not support the claim. The Vermont Supreme Court did not decide whether Vermont achieved a sovereign status in this period.

by this Court in *Vermont v. New Hampshire*, and used it in much the same way. *See* 289 U.S. at 612 ("the terms of the Congressional resolution cannot be interpreted without regard to the previous negotiations"). The focus of these negotiations was "the claim of private property" under the Wentworth grants, Pet. App. A 17 n.8, and Congress finally admitted Vermont to the Union when Vermont and New York agreed upon "the confirmation of the New Hampshire township grants". *Vermont v. New Hampshire*, 289 U.S. at 611.

III. The Decision Of The Vermont Supreme Court Was Based Entirely On Record Evidence And Facts Established At Trial.

Petitioners argue that the Vermont Supreme Court "retried" the case because the Court's decision refers to historical texts not introduced into evidence at the proceeding below. As a result, petitioners reason that their due process rights were violated by the Court's use of these materials. Petitioners are disingenuously critical of the Court's exhaustive discussion of pertinent historical facts and, at the same time, absentminded about parallel sources adduced at the hearing below that comprehend the same points.

The respondent agrees that the Vermont Supreme Court did refer to historical sources besides those relied on by the witnesses. However, the Court did not select facts *dehors* the record. Just as a trial court might fashion an instruction in its own language, the High Court was at liberty to consider cogent additional viewpoints that echoed matters already of record.

Petitioners single out four instances where the Vermont Supreme Court allegedly introduced "new facts without the benefit of the adversary process." Pet. at 21. Examination of these examples reveals that these "facts" are already of record. Petitioners protest two references to the dispute regarding the overlapping grants held by both the New Hampshire and the New York grantees. See Pet. App. A 15. The trial court's findings are studded with examples that discuss the competing claims for the same granted land. See, for example, Pet. App. B 31, ¶121; B 84. See also Order of the King in Council at Resp. App. A 1-3 that forbids the Governor of New York from making grants of lands already patented by New Hampshire. Because this factual area was fully litigated at the trial court, references in the Vermont Supreme Court's opinion to the ongoing land disputes and the grantees' responses presented no surprise to the petitioners.

Petitioners claim error associated with the mention of the Green Mountain Boys. Again, while the parlance is different, the content of the material at Pet. App. A 17 is identical to the trial court's own findings that note the presence of conflict between the New Hampshire grantees, including Ethan Allen, and the New Yorkers. See examples cited above. Below, both parties discussed the ongoing rivalry between New Hampshire and New York landowners.

Lastly, petitioners refer to Pet. App. A 22. The language common to all the grants made by the Royal Governor of New Hampshire directed the grantees to plant and cultivate the land and to make continuous improvements within specified time periods upon penalty of forfeiture. Pet. App. A 13 n.4. The record also demonstrated

that "[p]etitioners expended large sums of money in settling and cultivating the same." Resp. App. A 2. The record supports a tacit understanding that settlement in this region would continue with the support of the British government.

Petitioners' argument completely ignores the character of the evidence adduced at the trial court. Because the Supreme Court of Vermont did not "retry" this cause when the Court cited other additional authorities, there is no merit to petitioners' claim.

CONCLUSION

The Supreme Court of Vermont applied settled legal standards to the unique factual record of this case. Petitioners' claims that the Vermont Supreme Court wrongly applied this Court's precedents and relied on non-record evidence do not merit review by this Court. Moreover, the cause is not yet final.

Dated: January 18, 1993

Respectfully submitted,

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Attorney for Respondent

WILLIAM GRIFFIN
Of Counsel

ORDER OF THE KING IN COUNCIL

FORBIDDING THE GOVERNOR OF NEW YORK TO MAKE GRANTS OF ANY LANDS ALREADY PATENTED BY NEW HAMPSHIRE.

[Council Minutes Vol. XXVI.]

At the Court at St Jame's the 24th day of July 1767.

PRESENT.

THE KING'S MOST EXCELLENT MAJESTY.

Archbishop of Canterbury.	Earl of Shelburne.
Lord Chancellor.	Viscount Falmouth.
Duke of Queensbury.	Viscount Barrington.
Duke of Ancaster.	Viscount Clare.
Lord Chamberlain.	Bishop of London.
Earl of Litchfield.	Mr Secretary Conway.
Earl of Bristol.	Hans Stanley Esquire.

WHEREAS there was this day read at the Board, a Report from the Right Honorable the Lords of the Committee of Council for Plantation affairs, dated the 30th of last month in the words following viz

"Your Majesty having been pleased to refer unto this Committee the humble Petition of the Incorporated Society for the Propagation of the Gospel in foreign Parts, Setting forth among other things, that Benning Wentworth Esquire Governor of New Hampshire in New England, made several Grants of Large Tracts of Land lying on the West side of Connecticut River, which were incorporated into above one hundred Townships, and several shares were reserved in each of the said Grants to the Petitioners for a Glebe for the Church of England, and for

the benefit of a School: That the Government of New York having claimed the said Lands and the Jurisdiction thereof, granted great part of those Lands without reserving any shares for the abovementioned Public Uses: And therefore the Petitioners Pray that the Grants made by the Government of New Hampshire may be ratified and confirmed, or such order made thereupon as to your Majesty should seem meet – and your Majesty having been likewise pleased to refer unto this Committee the humble Petition of Samuel Robinson of Bennington in North America on behalf of himself and more than one thousand other Grantees of Lands on the West side of Connecticut River, under Certain Grants issued by the said Governor of New Hampshire. Setting forth amongst other things, that the said Governor made Grants to the Petitioners of several Tracts of Land lying as aforesaid on the Western side of the Connecticut River, which were incorporated into above one hundred Townships and supposed to lie within the government of New Hampshire, whereupon the Petitioners expended large sums of money in settling and cultivating the same. That on the 20th of July 1764 the said Lands having been declared by your Majesty to be within the Government of New York, the Lieutenant Governor of that Province made grants of part of the said Lands included within the Petitioners Grants, which being of infinite prejudice to them; they therefore most humbly pray (amongst other things) that their said several Grants made by Governor Wentworth may be ratified and confirmed under your Majesty's Royal Order. The Lords of the Committee in obedience to your Majesty's said Order of Reference, have taken the said Petitions into their Consideration, together with a

Report made by the Lords Commissioners for Trade and Plantations upon the former of the said Petitions, and do thereupon agree humbly to report as their opinion to your Majesty, that the most Positive orders should be immediately sent to the Governor of New York, to desist from making any Grants whatsoever of any Part of those Lands, until your Majesty's further Pleasure shall be known."

His Majesty taking the said Report into Consideration, was pleased with the advice of his Privy Council to approve thereof and doth hereby strictly charge require and command that the Governor or Commander in Chief of his Majesty's Province of New York for the Time being, do not (upon Pain of his Majesty's highest displeasure) presume to make any Grant whatever of any Part of the Lands described in the said Report, until his Majesty's further Pleasure shall be known concerning the same.

W: SHARPE.

On Reading and due Consideration Whereof, [20th October 1769] his Honour the Lieutenant Governor was pleased to require the opinion of the Council, whether his Majesty's said order extended to restrain the Granting of any Lands formerly claimed by New Hampshire, but which have not been granted by that Government: the Council thereupon declared they were of opinion his Majestys said order prohibited only the granting of such of the said Lands as have actually been granted by the Government of New Hampshire, and does not extend to any part of the said Lands which have not been granted by that Government.

B1

DEPOSITION OF GORDON M. DAY

* * *

August 25, 1987

* * *

[page 132]

Q. When did these grants of Benning Wentworth occur?

A. I'm not quite certain but sometimes these grants are made fairly early on, while Wentworth was lining his pockets and then subsequent sales and resales took place but the appearance of the settlers around 1670, began around 1670 I believe.

* * *

CORRECTIONS

* * *

PAGE

132 (lines 15-16) *1760* for '1670'